

LIBERALISM AND THE LAW

Justice Frankfurter and Professor Chafee

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THERE is a root ambiguity in the word "liberal." It is reflected in the fact that its opposite is in some contexts "illiberal," which no one will own up to being, and in other contexts "conservative," to which, if it is kept in lower case, everyone in some respect can make a claim. A resort to history is not likely to be decisive in establishing the proper usage of "liberal," primarily because in the past the term was preempted by particular social and political programs. To this day in Europe the predominant connotation of "liberal" is of laissez-faire economy, free trade, and opposition to government measures of welfare. And in the United States there are those who, like the adherents of the Liberty League in the 30's and the followers of Von Mises and Hayek today, regard freedom from government intervention as the key to all freedom.

Nonetheless there are two historical figures of the American past who in doctrine and temperament stand for what is commonly meant by liberalism: Jefferson and Lincoln. Jefferson is forever associated with the Declaration of Independence; Lincoln asserted that he had never had "a feeling, politically, that did not spring from the sentiments embodied in the Declaration of Independence." The Declaration was not only a pronouncement in favor of freedom but of equality. The notion that there is a necessary conflict between freedom and equality,

current in their day as in ours, was dismissed by both Jefferson and Lincoln, perhaps too simply, as a prejudice of those who believed that nature itself was organized along aristocratic lines. There were certain historical reasons, however, that led many to fear that political equality could be achieved only at the cost of individual freedom. At any rate, no scheme of political equality is conceivable or practicable without some form of majority rule. That is why, among other reasons, both Jefferson and Lincoln were passionately devoted to the principle of majority rule. Lincoln, especially, recognized what some of the sophisticated critics of the principle, who feared the tyranny of the majority, have failed to see: that the only alternative to majority rule is either despotism or anarchy, the tyranny of the individual (or cabinet, mistress, junta, council, or court) or the tyranny of the mob.

At the same time neither Jefferson nor Lincoln believed that the majority was necessarily right or wise. Nor did they embrace Rousseauistic nonsense about the general will. For both of them a democracy which was not enlightened could not long remain free. It is this recognition of the importance of creative intelligence in the functioning and defense of a free society, and in the liberation of human personality, which constitutes the link between John Dewey and Thomas Jefferson.

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AMERICAN liberalism owes to Jefferson its acceptance of the principle of majority rule, its trust and faith in the free play of intelligence as the means by which not merely programs of political action emerge, but, beyond that, institutions fostering enduring sentiments of freedom. As Justice

Frankfurter puts it: "This was the essence of Jefferson's social philosophy and the devotion of his life. It is the permanence of his meaning—to establish sentiments of freedom as the enduring habits of a people." These sentiments were not to be exercised vicariously or held in trust for the people by their betters.

From this principle Jefferson derived his well-known opposition to the doctrine of judicial supremacy. This opposition he bequeathed to contemporary liberalism; its most distinguished legal representative in our time, and possibly all time, was Justice Holmes. Although differing in their economic views, Holmes, Brandeis, Cardozo, and Frankfurter have been the great Jeffersonians on our bench. All of them recognize the necessity of a supreme *court* as well as a supreme *law*—else forty-eight different state legislatures and court systems would generate conflict and chaos. But at the same time they recognize that the supreme *law* in a democracy must express the legislative will of the nation as a whole and not merely the judicial will. The Constitution provides the guide lines to Congress, but cannot be made a fetish without violating the American spirit of government. Holmes recognizes the differences in the functions of the Court when he observes: "I do not think that the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."

What embarrasses the Jeffersonians on the bench, however, is that the Supreme Court, which is not responsible to the electorate, has the power, won for it by John Marshall, to nullify the acts of a Congress which is responsible to the electorate. No honest mind can contest Justice Frankfurter's reminder that "judicial review is a deliberate check upon democracy through an organ of government not subject to popular control." But the contention that such a check is necessary to prevent the tyranny of the majority, and that without such a check the civil liberties of minorities would necessarily be destroyed,

is sheer rationalization: it was property, not freedom, that the Supreme Court safeguarded throughout most of its history. Nor has that history been distinguished by the valiant defense of civil rights.

In England, where a proposal to give the courts the power to pass on the constitutionality of an Act of Parliament would be regarded as comparable to restoring the doctrine of the divine right of kings, civil liberties and minority rights flourish more luxuriantly than elsewhere. To be sure, majorities in a democracy may be foolish and tyrannical. But so may minorities if they have power. And the Supreme Court is the smallest of all minorities. If judges are to be our rulers, Morris R. Cohen used to say, they should be elected.

THE Supreme Court has, of course, sometimes spoken out very effectively in behalf of civil rights, most notably in *Brown v. Board of Education*, which outlawed segregation in the nation's public schools. But let us not forget that in doing so it reversed the deplorable decision of *Plessy v. Ferguson* upholding "equal" and "separate" facilities, a decision that for fifty-eight years gave legal sanctification to a pattern which the more recent decision cannot easily modify. If the reasoning of the Court in 1954 had been followed in 1896, by this time we would be much closer to rectifying the social and civil injustices from which our Negro fellow citizens suffer—and not only in the South. And if history is relevant, there are few if any Supreme Court decisions on civil rights whose beneficial effects begin to compare in importance with the grievous consequences of the Supreme Court's decision in the Dred Scott case, which some historians regard as one of the causes of the Civil War. Only historical myopia can see in the Supreme Court a consistent defender of civil liberties.

Justice Holmes and his Jeffersonian colleagues have met the embarrassment in which their power to nullify acts of Congress has placed them by a severe self-restraint. They have resolutely refused to impose their own conception of social and economic pol-

icy on the country in the guise of interpreting the wisdom of Constitutional fathers who never even conceived of the character of contemporary problems and issues. What Justice Frankfurter says of Holmes is only in slightly lesser measure true of himself. "Probably no man who ever sat on the court was by temperament and discipline freer from emotional commitments compelling him to translate his own economic or social views into Constitutional commands." That is why he frequently speaks of the need for humility and detachment lest "limitations in personal experience are transmuted into limitations of the Constitution."

As Alan F. Westin has shown in an informative and enlightening article in COMMENTARY ("Liberals and the Supreme Court," July 1956), this has led to considerable criticism of Justice Frankfurter by a highly articulate group of liberals whose attitude toward the Supreme Court is frankly opportunistic—critical when they disagree with the Justices, as in the 30's, and approving when they agree, as in the present. Some of the unjust aspersions upon Justice Frankfurter's liberalism reflect the extent to which principles that should guide democratic *process* are conceived of merely as useful instruments toward specific *programs*. One reviewer, not the worst, of Justice Frankfurter's recent collection of miscellaneous papers and addresses* (from which I have already quoted) interprets his emphasis upon the need for "dominating humility" in judges as signifying that the judge "must not follow his own conviction but must derive his judgment as a spokesman, vicar, or proxy of some authoritative outside voice" (*New York Times Book Review*).

Nothing could be further removed from Justice Frankfurter's meaning. A judge who does not follow his own conviction is unworthy of his post, but his conviction must not be arbitrary or molded only by what he is familiar with in his personal experience. He must have a sense of the limits of

his knowledge and of his power. He may, for example, be convinced that the free enterprise system is more efficient than any form of planned economy, and that all the freedoms of the Bill of Rights ultimately rest upon it, but he has no business reading that conviction into the Constitution by exegetical exercises on systematically ambiguous expressions like "due process." A judge without convictions should step down from the bench. But the conviction that he is not there to legislate; that the spirit of the democratic process gives this power to Congress; that on specific matters of policy he is not likely to be less foolish or more informed than most legislators; that although interpreting law is to some extent inescapably making law, there is a difference between adjudication and outright legislation—this according to Justice Frankfurter should be a judge's overriding conviction, and the source of his humility.

Justice Frankfurter pleads guilty to the charge of entertaining an "old-fashioned liberal's view of government and law." It is the liberalism with which we all grew up—even those who opposed it. If there has been any change, it has not been in Justice Frankfurter but in those sophisticated neo-Machiavellians who believe, despite the historical evidence, that in the long run courts are better guardians of the liberties and welfare of the people than a democratic legislature. They could well chew on his words: "If judges want to be preachers, they should dedicate themselves to the pulpit; if judges want to be primary shapers of policy, the legislature is their place." To make one's philosophy of judicial review dependent upon the composition of the Court at any definite time is cynical. Worse than cynical, it is foolish, for death and the pendulum of history are sure to place on the bench not merely conservatives but illiberals.

JUSTICE FRANKFURTER, like Holmes, recognizes the difference between what I have elsewhere called "the strategic freedoms," those upon which the functioning of the free market in ideas depends, like freedom

**Of Law and Men*, by Felix Frankfurter. Harcourt, Brace, 364 pp., \$6.75.

of speech, press, and assembly, and those freedoms which are required, say, for the functioning of the free market in commodities. But since the strategic freedoms are themselves not absolute and on occasion conflict, it is sometimes necessary to abridge a particular freedom in order to safeguard the entire complex of freedoms on which the democratic way of life rests. Here is the really troublesome area in which the justification for judicial review of Congressional legislation seems most plausible. Where Congress clearly acts in haste or panic, or in anticipation of having the Supreme Court save it from its own folly while it reaps electoral dividends, the Justices of the Court can exercise with an easy conscience the power John Marshall won for them. Justice Frankfurter, as I read him, would no more hesitate than Justice Holmes, under the *existing powers* of the Court, to put a brake upon Congressional action, to nullify legislation that clearly violated the strategic freedoms, even though he believes that the best appeal from majority rule, drunk and unenlightened, is to majority rule, sober and enlightened.

Such cases, however, are extremely rare. The more usual cases are those involving, as does the Smith Act, conflict between legitimate concern for the security of our system of freedom and legitimate fear that one or another strategic freedom has been too tightly circumscribed. Here, according to Justice Frankfurter, the issue is not whether the legislation is wise or justified, or whether the individual Justice agrees or disagrees with the way Congress has resolved the conflict of rights and interests, but whether the legislation was sufficiently reasonable in the light of the evidence and the spirit of deliberation. If the Smith Act is unwise, amend or repeal it, but do not invalidate it on the ground that you as an individual Justice personally do not appraise the Kremlin and its fifth column as a serious threat, or that if you had been a Congressman you would have voted against it. It is even conceivable that a Senator Douglas may understand the nature of the Communist threat better than

a Justice Douglas. There are obvious difficulties in interpreting the rule of "reasonableness," but they are less formidable than those involved in any alternative rule.

It betokens no lack of deference for the Supreme Court to recognize that Justices are capable of talking and writing nonsense like lesser mortals, including Congressmen; that the appearance of a Justice Holmes is the result of a mutation, not the operation of a rule; that many judges in the lower courts, such as Justice Learned Hand (whose opinion upholding the constitutionality of the Smith Act was much more profound than Justice Vinson's), know more law than do most Supreme Court Justices; and that the opinions of the Supreme Court are not unaffected by the winds of doctrine that blow in the market place. Every system of law needs a Supreme Court: but a truly democratic community does not need a Supreme Court as an arbiter of its destinies.

Despite his detractors, Justice Frankfurter's stature will grow with time and with the increasing political maturity of the American people. Though he, too, is capable of lapsing into absurdities—as in his recurring references to nature as democratic—he manages to keep them out of his judicial opinions. And although he admires Harold J. Laski, that smart silly man who never understood the United States (despite many visits, he described it as if it were still in the 1890's) and who divined in Stalin's Russia the future of civilization, his admiration is not for Laski's unoriginal ideas but for the good show Laski put on, tall stories and all.

II

IN TURNING to Professor Zechariah Chafee's collection of speeches and articles we encounter a different kind of liberal spirit.* For many years a distinguished colleague of Justice Frankfurter's at the Harvard Law School, learned in the history of the Bill of Rights, free from that judicial gravity which inhibits quick and spontaneous judgments

**The Blessings of Liberty*, by Zechariah Chafee. Lippincott, 350 pp., \$5.00.

on men and events, Mr. Chafee radiates a breezy confidence that he incarnates the liberal tradition and that those who differ with him about problems, especially security problems, are suspect in their devotion to freedom.

When Mr. Chafee defends free speech as a general principle he is magnificent, especially in his rhetoric. But we are living in an age one of whose paradoxical features is that in the abstract everyone is in favor of free speech, just as everyone is in favor of democracy. No longer is there honest opposition to free speech as a principle, or to democracy as a form of government. In the case of totalitarians like Communists and fascists, this defense of free speech, or claim to be democratic on occasion, is largely dishonest, and consciously so. But genuine differences among most Americans today arise not over the justification of free speech but over its *problems*: where free speech can be limited and when, and above all what *constitutes* a problem of free speech or a violation of free speech. And here the issue around which almost all contemporary controversy revolves is whether the problem of security is one involving free speech. Does barring a man from a government job because he belongs to a subversive organization *ipso facto* constitute a violation of free speech? Does barring a man from a position because he expressed opinions which bear relevantly upon the job he is expected to do—though he is left free to shout these opinions from a housetop—constitute a violation of free speech? Does the occasional stupidity and injustice of the security system mean that we do not need one or that we must think up a better one?

It is a pity that in his sense of exaltation as a champion of freedom, Mr. Chafee tends to regard almost the entire problem of national security as a simple one of freedom of speech. It would follow from some of the positions he takes that any intelligent and effective security system is incompatible with the Bill of Rights. In consequence, he is often careless in his writing, defective in his logic, and emotional about problems that

invite stubborn and prolonged thought. When he does reach sound conclusions it is sometimes in the fashion of someone who concludes that since the Mississippi rises in the French Pyrenees, and since France is a country in North America, therefore the Mississippi is a river in North America.

IRONICALLY enough, the valid criticism which Mr. Chafee makes of the deplorable excesses committed in the quest for security do not require the rhetoric and debating devices he employs. For example, discussing the ill-considered McCarran Act of 1950, and approving the sound objections contained in Truman's veto message, Mr. Chafee concludes with the pious observation: "We must choose between freedom and fear—we cannot have both. If we persist in being afraid, the real rulers of this country will be fanatics. . . ."

Now this is sloppy thinking. No one chooses to be afraid; if we *persist* in being afraid—that is the surest sign that we are not afraid. There is a sense in which we can choose to be free but there is no proper sense in which we can *choose* to fear. Further, freedom and fear are perfectly compatible, just as are wisdom and fear. If we did not fear tyranny, we would not safeguard our free institutions. Mr. Chafee's own language indicates this. If he did not fear the rule of fanatics, he would not write his indignant essays. Not fear but unintelligent fear is the enemy. It is just as bad as unintelligent complacency.

This is a minor point but there are so many of them that they indicate a consistent style of thought. Another example illustrates this from a different angle. Mr. Chafee is discussing the unimportance of the Communist party. And, of course, considered independently of the Soviet Union, as Mr. Chafee considers it, the party is hardly more than a nuisance. But the absurdity is to consider it independently of the strength of the Soviet Union. To establish the insignificance of the Communist party, Mr. Chafee compares the number of members of the Communist party in the

United States with that of the rest of the population. Historians, aware of Spartacus and Cromwell and Lenin, would scoff at this way of estimating the power of a revolutionary movement. Indeed, some of the fanatics whom Mr. Chafee fears argue that since the Bolsheviks were only a few thousand strong in February 1917 and were able to lay a mighty empire of tens of millions by the heels, they are a comparable menace everywhere. This is the counter-absurdity to Mr. Chafee's own procedure.

But it is the specific argument that Mr. Chafee offers in defense of his position which is instructive here. Writing in 1949, he compares the 70,000 members of the Communist party to the 150 million Americans and turns to his readers with the triumphant observation that the odds are almost 2,000 to 1 in favor of free institutions. Now, whatever the strength of his point, it would not be affected if the odds were 1,000 to 1 or even 100 to 1. But so indifferent is Mr. Chafee to the amenities of valid argument that he commits the statistical outrage of comparing 70,000 adult, dedicated, hardened, professional revolutionists, resting on a periphery of perhaps ten times that number, with a population which includes babes in arms, little children, the aged, infirm, sick, and confined. The same statistical method would confirm the claim of the old enlistment poster that it was safer to be a sailor on board Uncle Sam's battleships in the Spanish-American War than a civilian in the streets of New York.

I COME now to matters that are more serious. The excesses of the security program with which Mr. Chafee, like all American liberals, is legitimately concerned may partly be attributed to angry reactions to the absence of an effective security program in the palmy days when Hiss was a red herring. So long as there is no intelligent security program, excesses and injustices will be plentiful. The best remedy for the latter is thoughtful consideration of the former. In places Mr. Chafee tends to dismiss the question of security as if it were simply a

game of cops and robbers: wait until the criminal act is performed and then leave it to the FBI to catch the offenders. But certain actions connected with Communist infiltration, although highly undesirable, technically may not be criminal; and the function of a security program against espionage and sabotage is to *prevent* these activities from taking place, not to punish those guilty *after* they have taken place. Not only has Mr. Chafee nothing to say on this question: his point of view is such that it would actually prevent any security program from operating.

This comes about as follows. Mr. Chafee "detests" Communists. But even more than Communists he detests spies and government agents. Most of all, he detests renegade Communists. "The worst spy of all is the renegade. He has already double-crossed the community by engaging in wrongdoing and then double-crossed his associates by deserting them and helping to punish them." You cannot be sure that spies tell the truth—and certainly not that renegades will! Therefore he would not use them or place any trust in their testimony. How, then, would Mr. Chafee keep members of the Communist party—70,000 strong or even 35,000 strong—out of sensitive agencies like the many connected with the State Department, the military departments, the Atomic Energy Commission, or prevent them from having access to the secrets of our radar defense? (I assume that he would regard it as a legitimate measure of security, and not an expression of McCarthyism, to bar members of the Communist party from sensitive posts.) He rightly scorns hearsay evidence and dismisses membership in "alleged" Communist front organizations as worthless. How, then, tell whether X is a member of the Communist party? Presumably, the only method which meets with Mr. Chafee's approval is to ask him!

Mr. Chafee's emotionalism is apparent at every point in the discussion except the first. He detests Communists. "I have confronted a good many of them in the United Nations at Lake Success and Geneva. Some of them

are menaces, a good many others are nuisances. They are opposed to every ideal of freedom which I hold dear. . . ." But the problem of security is not fundamentally one of Soviet diplomats at Lake Success or Geneva. It is one of fellow citizens under known instructions to infiltrate into strategic and sensitive posts in government and society in behalf of a foreign government which is the spearhead of an international movement to destroy the society Mr. Chafee holds dear. Mr. Chafee seems unaware of these instructions. For all his knowledge of the propaganda of Communism, he is apparently unfamiliar with its organizational literature including specific injunctions to members to commit perjury when necessary in the party cause.

Mr. Chafee declares he wants "to prevent Communists from taking over our government and our lives and destroying our freedoms"—he has forgotten that he has told us there is no danger of this—but the actual problem is much more modest. For there is no danger, nor was there ever the remotest one, of Communists taking over the American government. The problem is much more modest. It is merely to keep them out of places where they can do harm, where as agents of a foreign power—and all members of the Communist party are potentially such—they can weaken the free world in its struggle with the Communist world. But how can Mr. Chafee keep Communists out of positions of trust if he is more distrustful of ex-Communists than of Communists, and rejects with burning scorn the testimony of FBI agents like Philbrick, and others who were never Communists, not because their testimony has been shown false but because of the nature of their roles?

MR. CHAFEE leaves no doubt that he puts far less trust in the Communist who recants than in the Communist who does not, because the first, as we have seen from the quotation above, is twice damned. Mr. Chafee makes so much of the fact that many well-meaning individuals got involved with Communist party organizations because of

idealistic leanings that it is surprising to read his denunciation of them as "having double-crossed the community by engaging in wrongdoing." Very well. Let us accept Mr. Chafee's recognition of the fact that all Communists have double-crossed the community and engaged in wrongdoing. What, now, shall our attitude be toward them when, having realized what they were doing, and seeking to make amends to prevent further wrongdoing, they turn, not without risk, on their former fellow conspirators? It is precisely when they do this that they incur Mr. Chafee's intensest displeasure. One act doesn't cancel the other in his eyes: it only aggravates it.

This is not a normal moral reaction. A sincerely repentant criminal who reveals and forestalls, at great risk to himself, further crimes by his associates is, morally, surely not worse than the unrepentant criminal. Those followers of Hitler who finally saw where he was leading Germany, broke with him, and tried to kill him were surely not worse than the unreconstructed Nazis who fought for Hitler to the last.

With such ideas about Communists, government agents, and ex-Communists, no security program is possible. If Mr. Chafee had the courage of his passionate resentments, he would, like Alan Barth (or, as he interprets Mr. Barth), make no bones about scrapping the whole program. This would rekindle the fires of McCarthyism.

How deep Mr. Chafee's emotionalism goes is evidenced by the positions it leads him to take on two legal matters—one involving the question of Congressional investigations, and the other his interpretation of the privilege against self-incrimination in the Fifth Amendment.

On the first question, again it is not Mr. Chafee's conclusion which is at fault. The activity of some Congressional committees, aside from possible criticism of them on grounds of their constitutionality, warrants strong rebuke. The recent harassment of Mr. Cogley and Mr. Javits typifies what is most objectionable in the procedure of these committees. It is, however, the reasoning which

attends Mr. Chafee's conclusion that is puzzling. It is not enough for him to point out that a Congressional committee is not a law enforcement agency. Nor is he satisfied with distinguishing, as some committee chairmen from Dies to Walter unfortunately have not, between inquiry into matters relevant to legislation and inquiry into personal opinion. He attacks Congressional committees for asking questions which result in the crimes of perjury and contempt, "crimes which would never have been committed at all except for the investigations." He charges that "the committees did not unearth the offenses, they created them." It is not the actions of the witnesses which are responsible for their plight—their words in the case of perjury, their refusal to speak in the case of contempt—but the actions of Congress which have "turned scores of previously law-abiding citizens into criminals."

To realize what egregious legal nonsense an illustrious professor of law can sometimes talk, we must recall that questions about membership in the Communist party, the source of its funds and related affairs, are perfectly relevant to the kind of information Congress should have in order intelligently to legislate—or not to legislate—about a variety of matters connected with Communism. A witness who fears that he may be prosecuted under the Smith Act or who fears that his answer would tend to incriminate him, whether in fact it does or not, whether he is a Communist or not, may invoke the Fifth Amendment with complete legal impunity. No Congressional committee has ever denied a witness that privilege except when he himself has waived it. If anything, these committees seem to be too eager to increase the number of those who invoke it.

We must remember that the witness found guilty of committing perjury or contempt must first be tried. The courts may not recognize the relevance of the questions to the scope of authorized Congressional inquiry. They may throw out the charge. The jury may refuse to convict. Mr. Chafee is talking about witnesses who have been legally convicted after a fair trial on the

basis of their lying words, or for defiance of a properly constituted legislative body. The committees, whatever one thinks of them, did not compel the witnesses to lie, or to withhold testimony. No system of law or government can permit the witness to be the final authority on what evidence is relevant or admissible.

To be sure, if no questions were asked, no perjury or contempt would be committed by refusal to answer. Should we therefore blame the questioners for these crimes? As well say that law is the cause of crime, marriage of divorce, property of theft; for if the first did not exist, neither would the second. The Congressional committees do not *make* the laws which govern perjury and contempt. And not *they*, but the courts, find witnesses guilty of breaking them. To lay the responsibility for the voluntary actions of the offenders at the door of the committees is comparable to holding the tariff laws responsible for the crime of smuggling. Since under the same laws, some smuggle and some do not, the laws cannot be the cause, or the most decisive part of the cause, of the crime of smuggling. Since only a handful of witnesses before Congressional committees commit perjury or contempt when questioned, the questions cannot be the cause, or the most decisive part of the cause, of these crimes.

SPACE does not permit a detailed analysis of Mr. Chafee's discussion of the privilege against self-incrimination and of the inferences which may legitimately be drawn from its invocation. His treatment is shot through with errors—some of logic, some of psychology, and most of common sense. It will be sufficient for our purposes here to focus discussion on an issue which divides Mr. Chafee from the position taken by Harvard University toward a professor who invokes the Fifth Amendment in answer to a question which bears on the fulfillment of his professional trust.

Harvard University has had a magnificent record in defense of academic freedom. On May 20, 1953, it declared:

We think membership in the Communist Party by a Faculty member today, with its usual concomitant of secret domination by the Party, goes beyond the realm of his political beliefs and associations. It cuts to the core of his ability to perform his duties with independence of thought and judgment. By the same token it is beyond the scope of academic freedom. In the absence of extraordinary circumstances, we would regard present membership in the Communist Party by a member of our Faculty as grave misconduct, justifying removal.

We deplore the use of the Fifth Amendment by a member of our Faculty. . . . *Furthermore, since we are not conducting a criminal trial, we will not shut our eyes to the inference of guilt, which the use of the Fifth Amendment creates as a matter of common sense. Hence, the use of the Fifth Amendment by a member of our teaching staff within the critical field of his possible domination by the Communist Party makes it necessary in our judgment for us to inquire into the full facts. We regard it as misconduct, though not necessarily grave misconduct [my italics].*

Mr. Chafee takes issue with the reasoning of the Harvard Corporation. He denies that the claim of the privilege is misconduct. "As one who has sworn allegiance to the Constitution, I think this is a very inappropriate phrase to apply to the use of a right given by the Constitution."

What Mr. Chafee is saying is that the exercise of a Constitutional right can never be an instance of ethical or professional misconduct; that because one is privileged to exercise a legal right it can never be morally wrong to exercise it. Mr. Chafee is demonstrably mistaken. What is legally permitted may be morally inadmissible. Depending upon the circumstances under which a legal right is exercised, the activity it involves might be the object of severe and justifiable moral censure.

Suppose a professor publishes something written by someone else, which is now in the public domain, under his own name. He is exercising his Constitutional right to freedom of the press. Plagiarism is not a crime. Yet although he is legally not liable, professionally and morally he is guilty of misconduct. Suppose a scientist cooks his ex-

periment for pay. There is nothing illegal about his action. He has a Constitutional right to do business this way. But he is guilty of the grossest professional and moral misconduct. Suppose a teacher abuses his students and colleagues with the vilest epithets, but stays just within the libel laws. He is exercising his Constitutional right to free speech, but professionally and morally this is conduct unbecoming a teacher. Like many others, Mr. Chafee hasn't the faintest notion that the objection to Communist party teachers does not lie in their "heterodox opinions" but in their *violations of professional ethics*.

The declaration of the Harvard Corporation goes to the heart of the matter in its assertion that sheer common sense indicates that invocation of the Fifth Amendment creates an inference, or presumption, of guilt. This presumption, of course, is not a conclusive one. But *unless resolved* in a hearing, which should be granted to all who invoke the privilege, it is normally sufficiently strong to justify the refusal of employment to someone in a position of trust who invokes the privilege against self-incrimination when asked questions bearing on the performance of his duties—a cashier, a nurse, a policeman, a guide, or even a newspaper man. Mr. Chafee's discussion of "the right not to speak" indicates that he flatly refuses to acknowledge that there is any legitimate inference of guilt, as a matter of common sense, whenever the privilege is invoked. Here he is in good company. The *obiter dicta* of several Justices of the Supreme Court show that they, too, have failed to see that because there is no *conclusive* presumption of guilt when the Fifth Amendment is invoked, it does not follow that it is illegitimate to infer a *presumption* of guilt.

There are three alternatives here to choose among, not two: no inference of guilt whatsoever, according to Mr. Chafee; a *conclusive* presumption of guilt, according to McCarthy; a presumption of guilt warranting further inquiry, according to common sense—and I say common sense because everybody makes this presumption in ordi-

nary life when he is not trying to prove a legal point.

IT IS in connection with his discussion of the Fifth Amendment that Mr. Chafee makes one of the most horrendous statements ever leveled against the system of American justice and the character of the American government. In explaining the position of a witness embarrassed by a question, he points out that if he answers falsely he may be convicted of perjury. Mr. Chafee then adds: "*And a perjury conviction may follow even if he answers truthfully; the witness may expect, with good reason, that the jury will disbelieve the truth, being persuaded by government witnesses who hate him and are themselves perjurers*" (my emphasis).

Mr. Chafee obviously believes that this is no mere possibility but occurs sufficiently often to represent a danger to innocent and truthful witnesses in American courts. I doubt whether the author grasps the clear import of the charge he is making not only against the courts but against his government. Not only does he fail to substantiate it as something which frequently occurs, he does not cite a single case (and as horrible as it would be, a single case would not prove the charge) in which an innocent man truthfully denying Communist connections was convicted of perjury. That he could bring himself to make such a charge impugning in this wholesale way the American system of justice, with all its imperfections, is a measure of his emotionalism. It blinds him to obvious facts such as that instructions to commit perjury are issued by the Communist party to its members, not by the government to its witnesses.

It remains to explain how a scholar of such learning, and one so passionately devoted to the traditions of freedom, should be so profoundly in error about the nature of the Communist problem in the world today. The explanation, I believe, is provided by Mr. Chafee himself when he writes: "It is now more than thirty-five years since my work as a student of freedom of

speech led me to pay considerable attention to the activities of Communists in this country. My considered opinion is that they are far less dangerous today [1949] than they were in 1919-1920, soon after the Russian Revolution."

Few opinions ever had less foundation in fact. The American Communist movement in 1919-20 was mainly a group of national sections which had split away from the Socialist party. They were completely isolated from American life, and most of their members could hardly speak English. With no mass organizations and without even the tiniest foothold in a trade union, they spent their time debating the merits of "mass action" over "action of the masses." For all their flaming manifestoes, it was *opéra bouffe*. They were torn apart by sectarian factionalism which did not end until 1929 when, under Browder, the original instructions of the Comintern began to be implemented, and infiltration on a large scale was undertaken, front organizations developed, and dual trade unionism finally abolished.

Most important of all, Mr. Chafee does not understand that, from the beginning down to the present, the threat of Communism to the United States was never endemic. Only as the foreign arm of the Soviet Union could the Communist party threaten American security. But in 1919-1920 the Soviet Union hung by a thread. There is no evidence that so much as a single cell was organized by the Communist party in any government service in 1919 and 1920. The Communist party became strong in this country only as the Soviet Union did. Mr. Chafee has obviously not studied the structure of Communist organization and the multiple threads which bind it to the greatest aggregation of power on earth. He would do well to read some of the literature published by the Congressional committees at which he scoffs. He would understand that in 1919-1920 it would have been far more accurate to regard the Communists as thoughtless heretics made feverish by their own rhetorical extravagances than as dangerous con-

spirators. They were more appropriately objects of satire and laughter than of Palmer's lawless and inhuman raids.

The paradox is that at a time (1949) when the Communist party was a powerful Fifth Column, not only organized underground but entrenched in large unions, able to launch a Progressive party that could snare more than a million votes, Mr. Chafee writes of Communists as if they were still primarily heretics rather than conspirators. He compares those who invoke the Fifth Amendment today when asked about their participation in Communist activities with honest and independent spirits like Thoreau and Garrison. But the words: "I am in earnest—I will not equivocate—I will not excuse—I will not retreat a single inch and I will be heard," sound worlds apart from "I refuse to answer on the ground that a truthful reply would tend to incriminate me."

FOR all his reading of Communist literature, Mr. Chafee understands the nature of the Communist movement no more in the small than in the large. He cites the Joint Anti-Fascist Refugee Committee as an organization dedicated solely to helping the widows and orphans of Spain, a victim, alas! of Congressional persecution. He seems unfamiliar with the evidence that not only was it a notorious Communist front but that a considerable portion of the money it raised "for widows and children" was actually diverted to Communist party purposes. Photostatic copies of the committee checks paid to Gerhard Eisler, under the alias of Eiseman, representative of the Comintern in the U.S. and the Kremlin's link with the American underground, were published in the news-

papers. They seem to have escaped Mr. Chafee's notice. It would have been more appropriate for an intelligent liberal to denounce this fraud on the American public than the Congressional investigation into what was transparently a part of the American Communist movement.

Despite the mountains of evidence about the character of the Communist movement, Mr. Chafee basically sees Communists in the same light as he saw Soviet diplomats at the United Nations: as mostly "nuisances." No one can question his liberalism. But liberalism is sentimentality unless its sentiment for freedom is nurtured by reason. It is not enough, as Mr. Chafee does, to praise reason. Better than praising reason is using it.

No one can put down Mr. Chafee's book without the feeling that, according to him, the greatest overt threat to American institutions comes not from the Stalins and the Khrushchevs, not from the Hisses, Fields, and the Dexter Whites, not from the Fuchses, Golds, and Rosenbergs, not from the Browders and Fosters and Dennises, but from the Chamberses and Philbricks, from the Brownells and Hoovers, from the House Committee on un-American Activities and the Senate Judiciary Sub-Committee on Subversive Activities. One can be a severe critic of the views and activities of all the latter without countenancing the absurdity of regarding episodic folly and stupidity as more reprehensible than systematic subversion of free institutions. Happily McCarthyism is dead—killed not by such criticisms as these of Mr. Chafee, on which it thrived, but by its own excesses. It is time to inter with it ritualistic liberalism which cannot distinguish between heresy and conspiracy.